

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:07-CR-159-D
No. 5:08-CV-594-D

UNITED STATES OF AMERICA,)
)
)
v.) **ORDER**
)
)
KENNETH FULLER,)
)
)
Defendant.)

On December 3, 2008, Kenneth Fuller (“Fuller” or “defendant”) filed a motion to vacate pursuant to 28 U.S.C. § 2255. On February 25, 2010, the government moved to dismiss the petition [D.E. 26]. On April 20, 2010, Fuller responded in opposition [D.E. 31]. On September 16, 2010, Fuller filed a motion to appoint counsel and for a hearing [D.E. 33].

In analyzing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must assume the facts alleged in the petition are true. See, e.g., Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009). Fuller claims, among other things, that he was denied the effective assistance of counsel when his attorney failed to file a timely notice of appeal after he unequivocally instructed his attorney to do so. Pet. 4; Mem. Supp. 1–2. The government claims that Fuller cannot demonstrate prejudice under Strickland v. Washington, 466 U.S. 668 (1984), because of the appellate waiver in Fuller’s plea agreement. Gov’t Mot. Dismiss 5–6. However, an attorney’s failure to file a requested notice of appeal deprives a defendant of an appellate proceeding and therefore prejudice is presumed. United States v. Poindexter, 492 F.3d 263, 268–69 (4th Cir. 2007). This presumption applies “even though the defendant may have waived his right to appeal.” Id. at

273. Thus, the court DENIES the government's motion to dismiss [D.E. 26]. The court DIRECTS that trial counsel submit an affidavit not later than September 9, 2011, stating whether she consulted with Fuller about an appeal and whether she promised to note an appeal but failed to do so. See Poindexter, 492 F.3d at 273; Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000); United States v. Peak, 992 F.2d 39, 42 (4th Cir. 1993). The court will rule on the motion to appoint counsel and the motion for hearing [D.E. 33] in due course.

SO ORDERED. This 9 day of August 2011.



JAMES C. DEVER III
United States District Judge